

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 468 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and Sd/-

MR.JUSTICE A.K.TRIVEDI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

STATE OF GUJARAT

Versus

BHARWAD BHABHA NAN

Appearance:

PUBLIC PROSECUTOR for Petitioner

NANAVATY ADVOCATES for Respondent No. 1, 2, 3, 4, 5, 6, 7, 8

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE A.K.TRIVEDI

Date of decision: 23/04/99

ORAL JUDGEMENT [Per A.K. Trivedi, J.]

1. Heard learned APP Mr. L.R. Pujari for the appellant and Mr. K.H. Desai for Nanavati advocates on behalf of the respondents.

The State has preferred the present appeal to challenge the legality and propriety of order of acquittal recorded by the learned Sessions Judge,

Junagadh dated 20th February, 1985, in the proceedings of Sessions Case No. 63/84.

2. That the respondents herein came to be tried in the Court of Sessions Judge, Junagadh for the charge in respect to offences made punishable under Sections. 302, 323, 324, 337, 504, 506 [2], 143, 147, 148 and 149 of Indian Penal Code. [Hereinafter referred to as 'IPC']. The accused No. 5 is also charged for offence under Sec. 25 [a] of the Arms Act.

The prosecution case as emanating from the information given by informant Oghad Bhagvan to the police could briefly be stated as under :-

The incident in question has occurred on 9-6-1984 at village Sonariya Tal. Una District Junagadh around 9-00 p.m. at the place opposite the house of accused No. 7 - Oghad Naran. As alleged by the informant, prior to 15 days of the said incident, there was an altercation between the brother of informant Mepa Bhagvan and accused No. 7 - Oghad Naran in respect to recovery of outstanding dues for the goods supplied by said Mepa Bhagvan to accused No. 7. It is alleged by the informant that accused No. 7 - Oghad Naran had paid the outstanding dues to his brother on the next day but had threatened his brother to the effect that he should start counting his days of life. According to informant on account of the said altercation there was an enmity between the accused No. 7 and his family members and as such on 9-6-84, around 8-00 p.m. when the informant was proceeding into the village to arrange for the labourers, he was intercepted near the house of one Dudha Bhana by accused No. 7 Oghad Naran, Accused No. 1 Bhana Nan, accused No. 3 Jodha Jiva, and accused No. 8 Bhopa Jiva. That all the accused gave filthy abuses to the informant and asked him where his brother was. The informant replied to them that his brother had gone out of the village. However, the above said accused persons rushed towards the informant to mount an assault and thereby the informant ran-away from the said place to his father's house. That on inquiry he learnt that his father and one guest - Bhagat Apa had gone to the house of the informant and as such the informant had started from his father's house to his own house. That on his way, when he was passing through the lane near the house of accused No. 7 Oghad Naran, he was again intercepted by abovestated persons. At that time, Oghad Naran accused No. 7 was armed with a knife, Jodha Jiva accused No. 3 was armed with an axe, accused No. 1 - Bhabha Nan was armed with an iron pipe, accused No. 6 - Oghad Bhikha was armed

with a stick, accused No. 8 - Bhopa Jiva was armed with an iron pipe, and the accused No. 2 Gobar Bhikha was armed with a stick. It is further alleged by the informant that all the accused persons had stopped the informant giving abuses and had mounted an assault on him. That thereby the informant started running backward. However, accused No. 1 - Bhabha Nan inflicted a blow with an iron pipe on his head. That the informant had started shouting for help, but accused No. 7 - Oghad Naran inflicted knife blows on the waist of the informant and as such, he fell down on the ground. At that time accused NO. 6 - Oghad Bhikha inflicted a stick blow on his back. According to the information it created a riotous situation and by this time, his father Bhagvan and his uncle Bhaya Uka came there. At that time accused No. 3 - Jodha Jiva inflicted an axe blow on the head of his father and as such, his father fell down on the ground and became unconscious. That when his uncle Bhaya Uka intervened, accused No. 8 Bhopa Jiva gave a pipe blow on the elbow of his uncle. It is also the allegation of the informant that on hearing his shouts his cousin sister Godavari and his mother Rupaben alongwith one Dudha Bhana had also come to the said place and other persons of the neighborhood had also arrived. The informant has further alleged that at that time, accused No. 2 - Gobar Bhikha had started pelting stones and as such, one of the stone, hit her sister Godavari on the leg. It is further alleged by the informant that by that time the accused No. 5 - Jodha Vagha had come there with a Tamancha and accused No. 4 Mala Bhikha had come with a Dhariya. That all the accused were exhorting to kill the informant, his father and his other family members. However, one Bhagat Apa who was treated as a priest in the village, came on the site of the incident and swore in the name of God to pacify the accused persons and on his intervention, the assaulting group had disappeared. According to the allegation of the informant, as his father was seriously injured, bleeding and unconscious, they removed him in a bullock cart to village Dhokadava where a private medical practitioner examined him and advised them to immediately take him to Una. That thereby the informant and his family members removed the injured in a Rickshaw to Una. That the Medical Officer at Una Hospital declared that his father was dead. That an intimation by means of Police Vardhi was sent from Una Hospital to the concerned police station and as such the police had come to the hospital. Thereafter, the informant was questioned by the police and he narrated the abovestated facts before the police officer by way of his complaint.

3. That on the basis of the information [Vardhi] received from MO - general Hospital, Una, the PSO - Una Police Station registered the offence vide CR No. 45/84 and forwarded the papers to PSI Kher [PW 12] for further investigation. That on completion of the investigation, chargesheet was filed against accused Nos. 1 to 8, in the Court of JMFC, Una which committed the case to the Sessions Court. The case was registered as S.C. NO. 63/84 and charge Ex.1 was framed and read over to the accused Nos. 1 to 8. That the accused Nos. 1 to 8 denied the charge and claimed to be tried.

4. That the prosecution relied on the following witnesses to establish the charge :-

Sr.No. PW No. Name of witnesses.

1. PW 1 Oghad Bhagvan Ex.13 - The informant and injured Eye-witness.
2. PW 2 Bhaya Uka Ex.14 Injured Eye-witness.
3. PW 3 Godawari Nanbhai Ex.15 - Injured Eye-Wt.
4. PW 4 Duda Bhana Ex.28- A resident in the neighbourhood of the place of incident who has turned hostile to prosecution.
5. PW 5 Dr. N.K. Desai Ex. 29 - Medical Officer of Una Govt. Hospital who has examined injured witness PW 1, PW 2 and PW 3. He has also examined accused No. 6 - Oghad Bhikha, accused No. 8 - Bhopa Jiva and accused No. 7 - Oghad Naran who were also brought to him as injured person in the incident.
6. PW 11 Dr. Vidulaben Bharatkumar Pandya Ex. 39 Medical Officer at Govt. Hospital, Una who has carried out the postmortem on the dead-body of deceased Bhagvan Hamir and has proved PM Note Ex. 26.

5. The prosecution has also examined Panch Witnesses Ismail Karmalbhair, Bhana Rama and Yusuf Hussain, respectively vide Exs. 31, 32 and 33. That PSI Rajpoot who has recorded the statements and Yadi received at the Police Station, is examined at Ex. 34 and the Investigating Officer Mr. J.S. Kher at Ex. 40. Over and above that, the prosecution has produced documentary

evidence and muddamal articles.

6. At this stage it is necessary to note that pending the final hearing of this appeal the accused No. 3 Jodha Jiva who is respondent No. 3 herein is reported to have expired on 21-5-97 and as such appeal against respondent No. 3 stood abated. That the Death Certificate of deceased Jodha Jiva is produced on record on behalf of the respondent. The facts apparent from the said certificate, have not been controverted on behalf of the State by APP.

7. Learned APP Mr. Pujari has taken us through the oral evidence as well as the documentary evidence and the impugned judgement. It is submitted by him that the trial court has erred in acquitting the accused on the ground that the prosecution has failed to explain the injuries found on the accused persons. However, learned APP could not dispute the facts that the material produced on record, disclose that two offences were registered at police station vide CR NO. 45/84 and 46/84 in respect to the same incident which has occurred at village Sonariya on account of violent clash between two groups of the village. That in the another offence the said informant Oghad Bhagvan and his uncle Bhaya Uka are shown as accused persons who are alleged to have caused injuries to accused No. 6 - Oghgad Bhikha, accused No. 7 - Oghad Naran and accused NO. 8 - Bhopa Jiva. That Sessions Case No. 64/84 is registered against the said informant Oghad Bhagvan and his uncle Bhaya Uka, after investigation of offence registered vide CR No. 46/84.

8. It is note worthy that PW NO. 5 - Dr. N.K. Desai, who had examined the injured witnesses - Oghad Bhagwan [PW NO. 1] and Bhaya Uka [PW NO. 2] and has issued injury certificate Ex. 7, has admitted during the cross-examination vide para 8 of Exh. 29, that all the injuries found on the persons of PW 1 and PW 2 were simple injuries. Furthermore, he has admitted that on the same day, one Oghad Bhikha [accused No. 6], Oghad Naran [accused No. 7] and Bhopa Jiva [accused No. 8] were brought to him in injured condition and he had examined them. Dr. Desai has recorded the findings of his examination as under :-

FINDINGS ON OGHAD BHIKHA.

1. C.L.W. over right frontal region of head, 1" X 1/2" X bone deep.

2. An abrasion over back of left shoulder,

1/2" X 1/2".

These injuries are possible by hard and blunt substance. Injury No. 1 is possible by blunt portion of the blade of Dhariya.

On the person of Bhopa Jiva, I had found two injuries as under :-

1. C.L.W. over left parietal region of head, 2" X 1/2" X bone deep.
2. An abrasion over left shoulder on top, 2" X 1/2".

These injuries are possible by hard and blunt substance like a stick.

On the person of Oghad Naran, I have found three injuries as under ;

1. A. C.L.W. over right parietal region, 1 1/2 X 1/2" X bone deep.
2. An incised wound over left fore-arm, 4" below the elbow on back-part, 1/2" X 1/8" X 1/3".
3. Tenderness over right shoulder, on back part.

Injuries Nos. 1 and 3 are possible by any hard and blunt substance like a stick and injury No. 2 is possible by a sharp cutting instrument like a Dhariya.

9. PW 11 Dr. Vidulaben Pandya, who has performed the postmortem on the dead-body of deceased Bhagwan Hamir has deposed vide Ex. 39 to prove PM Note Ex. 26. That accordingly following external injuries were found on the dead-body.

1. An incised wound left occipital region, 3" X 1/2" X bone deep, oblique in direction.
2. C.L.W. on left eye-brow, 1/4" X 1/4" X 1/2 " round.
3. C.L.W. posterior part of left ear, 1/2" X 1/4" oblique in direction.

4. Abrasion on forehead, 1" above the right eye-brow, 2" X 2".

5. Four bruises over left renal angle to midaxillary line, 6" X 2" each, oblique.

All these injuries, in the opinion of this witness Dr. Vidulaben Pandya at Ex. 39, are antemortem. On internal examination she found the following ;

1. On head incised wound left occipital region, 3" X 1 1/2" X bone deep.

2. Four bruises over left renal angle of midaxillary line, 6" X 2" each.

3. Abdominal cavity was full of blood with blood clots.

4. Spleen ruptured at posterior surface of normal spleen. The spleen was not deceased, meaning there was not any pathological condition.

The cause of death, in the opinion of this witness, is shock due to excessive haemorrhage because of the rupture of the spleen. Injury No. 5, in the opinion of the witness, is sufficient in ordinary course of nature to cause death. The witness further opines that injury No. 1 which can be caused by an axe was not likely to cause death. In cross-examination the witness deposed that rupture of the spleen may be attributed to the four bruises over left renal angle, but they may not necessarily result into rupture of the spleen. The cause of death, as per postmortem notes, is shock due to excessive haemorrhage because of the rupture of the spleen.

10. That the trial court has discussed the evidence of PW 1, PW 2 and PW 3 vide para 10, 11 and 12 of the judgement and on appreciation of the same in the context of other relevant material has concluded vide para 14 to the effect that the incident in question was a free fight between the two factions of the village Sonariya on account of enmity. That vide para 15 the trial court has held that the prosecution has failed to explain the serious injuries on the persons of accused Nos. 6, 7 and 8. That PW 1, 2 and 3 are lying on material part of the incident and therefore only on the sole evidence of these PWs, no conviction could be based especially when the said Prosecution Witnesses are inter-related.

11. The approach to be adopted by the High Court while exercising the appellate powers has been defined in long line of cases, since the pronouncement of Privy Council in the matter of WARREN DUNCAN SMITH VS. THE KING [AIR 1934 PC 2277]. That the apex court has endorsed the said view repeatedly and has enumerated the points to which High Court should give proper weight and consideration. That in the matter of AJIT SINGH THAKUR SINGH AND ANR. VS. STATE OF GUJARAT [AIR 1981 SC 733]. The said points are stated as under :

- [a] the view of the trial judge as to the credibility of the witnesses;
- [b] the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;
- [c] the right of the accused to the benefit of any doubt;
- [d] the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses and ;
- [e] where two reasonable conclusions can be drawn on the evidence on record, the High Court should as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the court below. In other words, if the main grounds on which the court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal."

12. That in view of above cited propositions of law, we have examined the conclusion reached by the trial court, on appreciation of oral evidence of PW No. 1, PW 2 and PW 3, in the context of facts and circumstances apparent from the other material produced on record. The trial court has come to the conclusion and in our opinion has rightly come to the conclusion that the evidence of informant Oghad Bhagvan cannot be accepted for more than one reason. The trial court has appreciated the evidence and has concluded that despite the facts produced on record, through PW NO. 5 - Dr. N.K. Desai in respect to serious head injuries found on the person of accused NOs. 6, 7 and 8, all the three prosecution witnesses -

PW Nos. 1, 2 and 3 have failed to explain as to how the said injuries were caused. The said injuries are not minor but serious injuries including incised wounds with bone depth. That PW NOs. 1, 2 and 3 though, injured Eye Witnesses are interse related and are also close relative of the deceased Bhagvan Hamir and as such are interested and partisan to prosecution. That their evidence should be strictly construed and subjected to corroboration. The trial court has also noted the fact that as per the map denoting the scene of offence produced on record vide Ex. 38, there are number of houses in the neighbourhood of the scene of offence and yet not a single independent witness has been produced by prosecution to support the story. The trial court has also considered that the defence has established through the cross-examination of PW Nos. 1, 2 and 3 that there was a crystalised enmity between the family members of informant - Oghad Bhagvan and accused persons on account of not sending Bai Mali, the daughter of cousin brother of informant whose marriage had taken place with the brother of accused No. 1 Bhabha Nan. That cousin sister of informant - Godavari has also not been sent to her matrimonial home who is a wife of accused No. 7. The trial court has also observed that the defence has established through the cross-examination of PW Nos. 1, 2 and 3, that accused Nos. 6, 7 and 8 received injuries in the incident which took place at the same time and same place, as deposed by informant. However, the prosecution witnesses have denied the suggestion that it was informant - Oghad Bhagvan and his uncle Bhaya Uka who were aggressors and have assaulted the accused Nos. 6, 7 and 8 and thereby there was a free fight between two rival factions, in which the informant Oghad Bhagvan, his father Bhagvan Hamir and Bhaya Uka, as well as accused NO. 6, 7 and 8 received bodily injuries.

13. The trial court having relied on observation made in the matter reported vide 21 GLR page 765, has rightly rejected the prosecution case as the prosecution having failed to explain the serious injuries on the persons of accused, appears to have suppressed the genesis and origin of occurrence. That true version of the incident has not been placed before the court. Furthermore, the trial court has also relied on the observations made by the Apex Court in the matter reported vide AIR 1976 page 2263 on the basis of which the following conclusion are reached ;

[1] That the prosecution has suppressed genesis and origin of the occurrence and thus has not presented the true version of the incident.

[2] The witnesses who have denied the presence of injuries on the persons of accused are lying on most material point, and therefore, their evidence being unreliable cannot be considered to decide the criminal liability.

[3] That in case there is a defence version which explains the injuries on the persons of accused, it is rendered probable so as to throw doubt on the prosecution case.

14. In our considered opinion the above cited conclusions reached by the trial court cannot be said to be unreasonable or unjust. In the facts and circumstances, we do not deem it just to disagree with the conclusion reached by the trial court, and as such, we hold that no interference of appellate court is warranted. As a result, the appeal fails, and stands disposed of, as rejected.

Rafik*